

STATE OF MICHIGAN
COURT OF APPEALS

BATTERY SOLUTIONS, INC.,

Plaintiff-Appellant,

v

AUTO-OWNERS INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED

March 18, 2014

No. 311168

Ingham Circuit Court

LC No. 11-000909-CK

Before: RONAYNE KRAUSE, P.J., and FITZGERALD and WHITBECK, JJ.

PER CURIAM.

Plaintiff, a Michigan corporation with general insurance policies provided through defendant, appeals as of right from the order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) in this breach of insurance contract action in which plaintiff sought a declaration that defendant had a duty to defend. We affirm.

In the underlying case, Triumvirate Environmental, Inc. ("TEI") brought suit against TerraAlpha Industrial, Inc. ("TerraAlpha"), and plaintiff and its owner and CEO, alleging breach of contract, tortious interference, negligence, and unfair business practices. TEI alleged that it had entered into a waste disposal contract with Energizer Battery Manufacturing, Inc. ("Energizer") for the disposal of waste materials, including "compromised" lithium batteries.

TEI further alleged that it had subcontracted with plaintiff for the disposal of those waste materials. TEI alleged that plaintiff originally agreed to international disposal at a price of \$1 per pound for transporting the lithium batteries to a recycling plant in Japan. In March 2008, TEI asserted, plaintiff informed it that plaintiff needed to raise the price to \$1.25 per pound, which TEI paid until July 2008, when plaintiff informed it that the only option available for recycling the defective lithium batteries was a domestic smelter, and that such recycling would cost \$2.25 per pound. TEI agreed to the price change.

However, TEI alleged, "[a]lthough [plaintiff] represented to TEI that its costs were increasing, in fact, from and after March 2008, its costs for disposing of the primary lithium batteries had decreased." Moreover, TEI continued, rather than disposing of the batteries domestically, as plaintiff indicated it needed to do in July 2008, plaintiff had actually subcontracted the disposal to TerraAlpha, without TEI's knowledge and in violation of the contract between TEI and plaintiff, and that TerraAlpha had sent the batteries to China. TEI

alleged that TerraAlpha had advised plaintiff that it would not be disposing of the defective batteries, but rather selling them.

“On November 3, 2010,” TEI alleged, “Energizer informed TEI . . . it had discovered that Energizer batteries which it had paid TEI to recycle and dispose of were being offered for sale on several Chinese websites.” TEI alleged that Energizer had demanded that TEI take responsibility for the improperly disposed of batteries, and that Energizer had also demanded that TEI make a full accounting of how “each and every shipment of batteries sent by Energizer to TEI has been handled.” TEI filed suit, alleging breach of contract, interference with the TEI/Energizer contract, intentional and/or negligent misrepresentation, negligent disposal of the batteries, and unfair and deceptive business practices.

On February 3, 2011, plaintiff issued a written request to defendant for a defense in the TEI case under the terms of the general liability insurance policies issued by defendant. This request was denied.

Plaintiff brought suit against defendant for failing to fulfill its duty to defend in the underlying suit under the terms of the applicable policies. Plaintiff alleged that the policies contained coverage for “personal injury,” including “written publication of material that slanders or libels a person or organization or disparages a person’s or organization’s goods, products or services.” Plaintiff noted that TEI had alleged in the underlying lawsuit that its goodwill and reputation had been damaged by the improper disposal of the batteries.

Plaintiff moved for summary disposition, arguing that the Chinese advertisement disparaged Energizer’s goods and arose out of plaintiff’s business because, but for plaintiff’s alleged actions, the batteries would not have ended up for sale on the Chinese website. Plaintiff also argued that coverage was not excluded under the policy provisions excluding coverage for personal injury arising out of a breach of contract, as TEI’s complaint also asserted a theory of tort liability. Defendant filed a cross-motion for summary disposition, arguing that the Chinese advertisement did not disparage Energizer’s products, and, in any event, any alleged disparagement did not arise out of plaintiff’s business as required under the applicable insurance policies. Defendant also argued that summary disposition was appropriate due to the provision in the policies which excluded coverage for personal injury claims arising out of a breach of contract.

Following oral arguments, the trial court granted summary disposition to defendant. The trial court found that no advertising injury occurred because the publication in issue was on a Chinese website, “not the insured’s advertisement.” Further, the court concluded that plaintiff failed to establish a “personal injury” arising out of its business. The trial court also found that coverage was excluded under the policy exclusions for personal injury arising out of a breach of contract, as the injuries claimed by TEI flowed from plaintiff’s breach of its waste disposal contract with TEI.

A trial court’s decision to grant summary disposition is reviewed de novo, *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999), as is the interpretation of the language of an insurance contract, *Citizens Ins Co v Pro-Seal Serv Group, Inc*, 477 Mich 75, 80; 730 NW2d 682 (2007).

Appellate review of the grant or denial of a summary-disposition motion is de novo, and the court views the evidence in the light most favorable to the party opposing the motion. Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ. [*West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003) (citations omitted).]

Plaintiff argues that the trial court erred by determining that the claims made against it were not covered under plaintiff's personal injury coverage through defendant. Under the relevant policy language, defendant provided coverage for "personal injury" that "is caused by an offense arising out of [the insured's] business." "Personal injury" includes any "written publication . . . of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services."

The underlying complaint contains no allegations of libel, slander, or disparagement. Plaintiff asserts that TEI alleges reputational damage that should be traced back to the Chinese advertisement that described defective Energizer batteries as genuine, quality energizer products. The actual contents of the advertisement cannot be classified as libelous, slanderous, or disparaging. Although the batteries were not in their "original package[s]" or "totally new," as advertised, these statements are not in and of themselves defamatory of TEI, i.e., they do not tend to harm TEI's business reputation. See *Rouch v Enquirer & News of Battle Creek Michigan*, 440 Mich 238, 251; 487 NW2d 205 (1992). Moreover, Black's Law Dictionary (9th ed) defines "disparagement" as "[a] false and injurious statement that discredits or detracts from the reputation of another's character, property, product, or business." The contents of the Chinese advertisement describe the batteries as genuine, high quality batteries, is not, in and of itself, an injurious description.

Plaintiff asserts that the description was false because the batteries were defective and discredited Energizer's products by convincing consumers who bought the batteries that defective batteries were standard Energizer products. This argument fails to acknowledge that no evidence was presented to establish whether these batteries were sold, to whom they were sold, and the reaction to the performance of the batteries. Accordingly, plaintiff's characterization of the advertisement as disparaging is wholly based on a hypothetical consumer reaction and has no basis in either the record or the actual allegations in TEI's complaint. In any event, any alleged injury flows to the owner of the website and/or Energizer.

Moreover, defendant had no duty to defend against TEI's claims unless any defamatory or disparaging communication arose out of plaintiff's business. Here, plaintiff admitted that it was unknown who posted the batteries for sale in China or how the batteries were obtained after plaintiff provided them to TerraAlpha. A finding that the contents of the advertisement arose out of or originated from plaintiff's business would require attributing the actions of an unknown seller, who obtained the defective batteries through unknown means, to arise out of the actions of plaintiff's business because plaintiff had surrendered possession of those defective batteries to TerraAlpha. There is no evidence that plaintiff made a defamatory communication to

TerraAlpha or of a special relationship that would justify imputing TerraAlpha's behavior to plaintiff.

Next, plaintiff argues that the trial court erred by finding that defendant's duty to defend was excused by the policy exclusion for breach of contract. Under the terms of the policies in question, coverage for personal injury is excluded if the injury arises out of a breach of contract. Here, the complaint against plaintiff alleged a number of injuries stemming from plaintiff's unauthorized subcontracting of battery disposal duties, as well as from plaintiff charging agreed upon domestic disposal rates while disposing of the batteries internationally without permission. Accordingly, the injuries alleged in the complaint against plaintiff arose out of plaintiff's alleged breach of its contract with TEI, and are excluded from coverage under the policy in question.

Plaintiff contends, however, that a duty to defend exists under the policy because TEI's allegations were asserted under additional theories other than breach of contract. This argument attempts to separate what plaintiff asserts are independent torts from the contractual breach. All of these asserted torts (negligence, misrepresentation, unfair trade practices) stem from the alleged breach of contract. The unambiguous application of an exclusion cannot be defeated by referencing separate, non-excluded grounds for providing coverage. See *Vanguard Ins Co v Clarke*, 438 Mich 463, 470-472; 475 NW2d 48 (1991), overruled on other grounds by *Wilkie v Auto-Owners Ins Co*, 469 Mich 41; 664 NW2d 776 (2003). Requiring defendant to defend plaintiff in the presence of a clearly applicable policy exclusion solely because TEI alleged alternative, non-excluded theories, would render the policy exclusion a nullity. Because the complaint against plaintiff stemmed from plaintiff's breach of contract, the trial court did not err by finding that the complaint fell within a policy exclusion and that defendant had no duty to defend under the policy.

Affirmed.

/s/ Amy Ronayne Krause
/s/ E. Thomas Fitzgerald
/s/ William C. Whitbeck